Supreme Court, U.S.
FILED
JUL 19 1982
Alexander L. Stevas, Clerk

No. 81-2215

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H.L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

vs.

ELI LILLY AND COMPANY,

Respondent.

MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, petitioners hereby move to defer consideration of their Petition for a Writ of Certiorari until the filing of the Petition for a Writ of Certiorari in Mendel Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982) ["Schwimmer v. Sony"].

1. The Petition for a Writ of Certiorari in this case was filed on May 28, 1982. Respondent's brief in opposition was filed on June 25, 1982.

2. Counsel for petitioners in this case also served as counsel for Appellee in Schwimmer v. Sony. Our firm will be filing a Petition for a Writ of Certiorari in that case no later than August 16, 1982. The petition is due on August 2, 1982, and Petitioner will be seeking an extension of no more than two weeks.

3. The primary reason for this motion is that the Schwimmer v. Sony decision involves many of the same issues raised in this case. Both petitions seek review of decisions by the United States Court of Appeals for the Second Circuit which reversed jury verdicts in favor of petitioners. Both involve findings of vertical conspiracies under Section 1 of the Sherman Act which were upheld by the District Court on motions for judgment n.o.v.

4. Schwimmer v. Sony and Moore v. Lilly are jointly considered a legal doctrine within the Second Circuit. That court upheld a grant of judgment n.o.v. on a tying claim and referred to these decisions as "two cases pointing to the correct decision in this case." Unijax, Inc. v. Champion Int'l, Inc., _____F.2d_____ (2d Cir. June 21, 1982).

5. The Schwimmer v. Sony case also conflicts with a line of cases in other circuits relating to the definition of "combination or conspiracy" under Section 1 of the Sherman Act. Because the Schwimmer v. Sony decision cites Moore v. Lilly in its legal analysis, we respectfully submit the two cases should be considered together. Both decisions also present an issue as to when an appellate court is required to remand a case for the district court's consideration of a new trial motion.

6. For the foregoing reasons, I respectfully request that the Court defer consideration of the Petition for a Writ of Certiorari in this case.

Dated: July 16, 1982

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CERTIFICATE OF SERVICE

I, MILTON A. BASS, a member of the Bar of the Supreme Court of the United States and counsel of record for petitioners, hereby certify that on July 16, 1982, pursuant to Rule 28, Rules of the Supreme Court, I caused to be served one (1) copy of the foregoing Motion to Defer Consideration of Petition For a Writ of Certiorari on counsel for respondent herein by hand delivery to:

EDWARD SHERRY, Esq.
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005

All parties required to be served have been served.

Dated: July 16, 1982

Milton A. Bass